(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

Date: FEB 2 1 2013 Office: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reconsider.[1] The motion will be granted, and the appeal dismissed.[2]

The petitioner is a non-profit research organization. It seeks to employ the beneficiary permanently in the United States as a mobilization and outreach associate pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification, certified by the United States Department of Labor (DOL).

The director determined that the ETA Form 9089 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director denied the petition accordingly on May 11, 2010.

The petitioner's current counsel subsequently filed a timely appeal on June 14, 2010.

On May 17, 2012, the AAO dismissed the petitioner's appeal upholding the director's decision to deny the petition.

On motion, counsel asserts that the petitioner's intent that the Form I-140, Immigrant Petition for Alien Worker, was to be submitted for a skilled worker or professional pursuant to section 203(b)(3) of the Act was clearly evident prior to the director's adjudication of the petition and that United States Citizenship and Immigration Services (USCIS) should allow for a re-adjudication of the Form I-140 under this classification. Counsel cites a variety of federal district court cases, federal circuit court cases, unpublished AAO decisions, USCIS publications including policy memoranda, and instructions for the filing of the Form I-140 petition on the USCIS website in support of the statements made on motion.

As set forth in the director's denial and the AAO's decision, the primary issue is whether or not the offered job of mobilization and outreach associate requires a professional holding an advanced

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[1] A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *Id.* A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

[2] Although the service center director issued a decision denying the motion to reconsider on September 12, 2012, the service center director lacked the authority to issue a decision relating to the motion as the office having jurisdiction in the instant case was the AAO pursuant to 8 C.F.R. § 103.5(a)(1)(ii), as the AAO had issued the latest decision in the proceeding. Accordingly, that decision is withdrawn.

degree or the equivalent of an alien of exceptional ability and, therefore, whether the beneficiary can be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

Here, the Form I-140 was filed on July 30, 2009. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

In this case, the job offer portion of the ETA Form 9089 indicates that the minimum level of education required for the position is a bachelor's degree in business administration and that four years of experience in the job offered is required. Accordingly, the job offer portion of the ETA Form 9089 does not require a professional holding an advanced degree or the equivalent of an alien of exceptional ability. Although the Form I-140 petition was accompanied by cover letters from both the petitioner's former counsel and the petitioner indicating that the petitioner intended the petition to be submitted for a skilled worker or professional pursuant to section 203(b)(3) of the Act, the director chose to adjudicate the petition by issuing a Notice of Intent to Deny on April 6, 2010, based upon the fact that the petitioner's former counsel checked the box at Part 2.d. of the Form I-140 indicating the petitioner was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability pursuant to Section 203(b)(2) of the Act. As noted previously, the director subsequently denied the Form I-140 petition on May 11, 2010. The director noted that with a petition for a member of the professions holding an advanced degree or an alien of exceptional ability pursuant to Section 203(b)(2) of the Act, the specific minimum requirements for the position stated in the supporting labor certification shall be considered controlling in determining

whether a position meets the threshold for this classification. *Matter of Cantec Representatives, Inc.*, 19 I&N Dec. 241 (Comm'r 1984)

The petitioner's current counsel subsequently filed an appeal to the director's denial of the petition in which counsel asserted that the petitioner's previous attorney sought classification as an advanced degree professional or alien of exceptional ability in error by mistakenly checking block "d" in Part 2 of the Form I-140. Counsel contended that the petitioner's former attorney should have checked block "e" for a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A). Counsel submitted documentation in support of the appeal. Nevertheless, the AAO determined that the evidence contained in the record did not establish that the ETA Form 9089 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and therefore, the AAO dismissed the appeal on May 17, 2012. Specifically, the AAO found that the petitioner had requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability and the Form I-140 petition had been correctly adjudicated on this basis. The AAO noted that a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988). The AAO further noted that USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 406 (Comm'r 1986).

On motion, states that USCIS misinterpreted applicable case law in relying upon holdings reached in *Matter of Cantec Representatives, Inc.,* 19 I&N Dec. 241, *Matter of Izummi*, 22 I&N Dec. 169, and *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, to deny the petition and dismiss the subsequent appeal. While counsel attempted to distinguish the cases by noting that these cases involved different facts than those of the instant case, the cited cases are precedent decisions of USCIS and the holdings therein represent mandatory authority which must be followed.

Counsel claims that USCIS erred by failing to correct a clerical error made in the preparation of the Form I-140 petition in which block "d" in Part 2 of the Form I-140 seeking classification as an advanced degree professional or alien of exceptional ability pursuant to section 203(b)(2) of the Act was mistakenly checked rather than block "e" for a professional or skilled worker pursuant to section 203(b)(3)(A) of the Act. Counsel contends that cover letters and the ETA Form 9089 that accompanied the Form I-140, as well as the petitioner's response to a Notice of Intent to Deny issued in these proceedings, all demonstrated prior to the adjudication of the Form I-140 that the petitioner intended the petition to be considered under the professional classification as the proffered position required only a United States baccalaureate degree or a foreign equivalent degree and four years of experience. Counsel notes that the director's denial of the petition and the AAO's dismissal of the appeal are arbitrary and capricious because the director and the AAO failed to consider the legal arguments made by counsel and the precedent decisions cited in support of these arguments. Counsel contends that these actions are contrary to the decisions in *The Button Depot v. USDHS,* 386 F.Supp. 2d 1140 (C.D. Ca. 2005) and *The Young China Daily v. Chappell,* 742 F.Supp. 552 (N.D. Ca. 1989). Counsel states that the director's denial of the petition and the AAO's dismissal of the appeal are inconsistent with USCIS's practice because the AAO has previously allowed petitions to be amended relating to classification in cases where the evidence in the record and supporting

documents established that the petitioner intended or specifically requested a different classification than indicated on the Form I-140 prior to the adjudication of the petition. Counsel provides copies of unpublished AAO decisions to support this statement and notes that consistent USCIS practices are required by the holdings reached in *Davila-Bardales v. INS,* 27 F.3d 1 (1st Cir. 1994), *Medellin v. Bustos,* 854 F.2d 795 (5th Cir. 1988), and *Haoud v. Ashcroft,* 305 F.3d 201 (1st Cir. 2003). Counsel asserts that the director's denial of the petition and the AAO's dismissal of the appeal are inconsistent with published agency policy as a number of USCIS publications as well as the USCIS website, allow a petition to be amended relating to classification in cases where the evidence in the record and supporting documents established that the petitioner intended or specifically requested a different classification than indicated on the Form I-140 prior to the adjudication of the petition. Finally, counsel contends that the decision reached by the Board of Alien Labor Certification Appeals (BALCA) in *Matter of HealthAmerica,* 2006-PER-1, (July 18, 2006) (en banc), allowed the DOL to amend and correct labor certifications that contained inadvertent and harmless typographic or clerical errors.

Nevertheless, the authority to consider a petition under a different classification than that indicated on the Form I-140 is discretionary and must be exercised prior to the adjudication of the petition. In the instant case, the director chose not to exercise this discretion and adjudicated the Form I-140 utilizing the requested classification of an advanced degree professional or alien of exceptional ability pursuant to section 203(b)(2) of the Act. The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.,* 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd,* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even USCIS internal memoranda do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely."); *see also* Stephen R. Viña, Legislative Attorney, Congressional Research Service (CRS) Memorandum, to the House Subcommittee on Immigration, Border Security, and Claims regarding "Questions on Internal Policy Memoranda issued by the Immigration and Naturalization Service," dated February 3, 2006. The memorandum addresses, "the specific questions you raised regarding the legal effect of internal policy memoranda issued by the former Immigration and Naturalization Service (INS) on current Department of Homeland Security (DHS) practices." The memo states that, "policy memoranda fall under the general category of nonlegislative rules and are, by definition, legally nonbinding because they are designed to 'inform rather than control.'" CRS at p.3 citing to *American Trucking Ass'n v. ICC,* 659 F.2d 452, 462 (5th Cir. 1981). *See also Pacific Gas & Electric Co. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974), "A general statement of policy . . . does not establish a binding norm. It is not finally determinative of the issues or rights to which it is addressed. The agency cannot apply or rely upon a general statement of policy as law because a general statement of policy announces what the agency seeks to establish as policy." The memo notes that "policy memoranda come in a variety of forms, including guidelines, manuals, memoranda, bulletins, opinion letters, and press releases. Legislative rules, on the other hand, have

the force of law and are legally binding upon an agency and the public. Legislative rules are the product of an exercise of delegated legislative power." Id. at 3, citing to Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use them to Bind the Public?*, 41 Duke L.J. 1311 (1992).

Counsel asserts that the failure of both the director and the AAO to consider his legal arguments and the decisions cited in support of these arguments is arbitrary and capricious. Counsel contends these actions are contrary to the United States district court decisions in *The Button Depot v. USDHS,* 386 F.Supp. 2d 1140 and *The Young China Daily v. Chappell,* 742 F.Supp. 552. However, a review of the record reveals that the director and the AAO have given due consideration to counsel's arguments throughout these proceedings. Further, these decisions are not binding here primarily because the instant case does not originate in either of the respective districts, the Central District of California and the Northern District of California, in which the courts issued the decisions in *Button Depot* and *Young China Daily.* Even if the instant case had originated in either the Central District of California or the Northern District of California, the AAO may consider the reasoning utilized in these decisions but is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-,* 20 I&N Dec. 715 (BIA 1993). Further, the decisions in *Button Depot* and *Young China Daily* are distinguishable in that both cases involved the adjudication of H-1B nonimmigrant visa petitions rather than an immigrant visa petition as in the instant case.

Counsel contends that the decision reached by BALCA in *Matter of HealthAmerica,* 2006-PER-1, where it was held that denials of the labor certification due to inadvertent, harmless errors may be inappropriate was applicable in the instant case. However, the decision in *Matter of HealthAmerica* involved a labor certification that had been denied by the DOL, while in the instant case the ETA Form 9089 and the requirements contained therein had already been accepted for processing and approved by the DOL. Furthermore, a BALCA decision is not binding in these proceedings even if it were pertinent. While 8 C.F.R. § 103.3(c) provides that USCIS precedent decisions are binding in the administration of the Act, BALCA precedents are not similarly binding. *See* 8 C.F.R. § 103.9(a).

In this case, the job offer portion of the ETA Form 9089 indicates that the minimum level of education required for the position is a bachelor's degree in business administration and that four years of experience in the job offered is required. Accordingly, the job offer portion of the ETA Form 9089 does not require a professional holding an advanced degree or the equivalent of an alien of exceptional ability.

While not noted in either the director's denial of the petition or the AAO's dismissal of the appeal, the next issue to be examined in the instant proceedings is whether the petitioner has established the continuing ability to pay the proffered wage since the priority date.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D.

Cal. 2001), *aff'd,* 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (AAO's *de novo* authority is well recognized by the federal courts).

The petition has a priority date of November 29, 2008, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). The proffered wage as stated on the ETA Form 9089 is $50,000.00 annually.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The record contains a Form W-2, Wage and Tax Statement, which reflects that the petitioner paid the beneficiary $56,237.71 in wages in 2008. The record also contains paycheck statements dated March 13, 2009, March 31, 2009, April 15, 2009, April 30, 2009, May 15, 2009, May 29, 2009, June 15, 2009, and June 30, 2009, which reflect that the petitioner paid the beneficiary $20,352.57 in wages in 2009. Although the petitioner established it paid the beneficiary the full proffered wage of $50,000 in 2008, the petitioner failed to submit sufficient evidence to demonstrate it paid the beneficiary the full proffered wage in 2009. Additionally, the petitioner failed to provide any evidence such as its federal tax return or an audited financial statement for 2009 in order to determine whether it possessed the ability to pay the difference between wages paid to the beneficiary and full proffered wage in this particular year. Further, the record is absent any evidence that the petitioner paid the beneficiary any wages in 2010, 2011, and 2012. Moreover, the record does not contain any evidence such as its federal tax returns or audited financial statements for 2010, 2011, and 2012 in order to determine whether it possessed the continuing ability to pay the full proffered wage in these particular years. Therefore, the petition must be denied because the petitioner failed to establish its continuing ability to pay the proffered wage of $50,000.00 in 2009, 2010, 2011, and 2012.

Finally, although not noted in either the director's denial of the petition or the AAO's dismissal of the appeal, the next issue to be examined in the instant proceedings is whether the beneficiary possessed the required education, training, experience, and skills as stated on the labor certification.

A petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977). S*ee also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional

requirements. *See Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. at 406; s*ee also Madany* v. *Smith,* 696 F.2d 1008, (D.C. Cir. 1983); *K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc.* v. *Coomey,* 661 F.2d 1 (1st Cir. 1981).

Even though the labor certification may be prepared with the alien in mind, USCIS has an independent role in determining whether the alien meets the labor certification requirements. *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D. Or. Nov. 30, 2006). Thus, where the plain language of those requirements does not support the petitioner's asserted intent, USCIS "does not err in applying the requirements as written." *Id.* at *7.

The regulation at 8 C.F.R. § 204.5(g)(1) states, in part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. *If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.*

(Emphasis added). Therefore, USCIS may accept other reliable documentation relating to the beneficiary's employment experience to establish that the beneficiary possesses the experience required by the terms of the labor certification. Such evidence may include statements from former supervisors and coworkers who are no longer employed by the petitioner. USCIS may also consider copies of Forms W-2, Wage and Tax Statement, issued by the prior employer, paychecks, offer letters, employment contracts, or other evidence to corroborate the identity of the employer and the nature and duration of the claimed employment.

As noted previously, the priority date of the ETA Form 9089 in the instant case is November 29, 2008. In an attachment to Part H. Question 11., of the ETA Form 9089, the petitioner described the job duties of the offered position of "Mobilization and outreach associate" as follows:

> Works with Executive staff to maintain internal infrastructure and resources supporting the work of NBPTS field staff; develop and manage programs for teacher recruitment, align program activities with legal and Federal guidelines; budget mgmt; conduct database administration, consultants mgt and training, event mgmt, research and data collection and analysis; develop electronic and web based informational resources; build online communities and collaborations. Require strong project mgmt, admin and organizational skills; proficiency in research, data collection and analysis; technical writing; build virtual communities and facilitate collaboration.

The required education, experience, and skills for the offered position are set forth at Part H of the ETA Form 9089. In the instant case, the labor certification states that the offered position of

"Mobilization and outreach associate" has the following minimum requirements:

H.4. Education: Bachelor's degree in "Business Administration."
H.5. Training: None required.
H.6. Experience in the job offered: 48 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: None accepted.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: "Proficient in MAC and PC; advanced MS Word, PowerPoint, Excel, iMIS, ACT!, desk-top publishing and online project mgmt."

In Part J of the ETA Form 9089, the beneficiary indicated that the highest level of education achieved relevant to the requested occupation was a bachelor's degree in "Business Administration with Marketing and Management Concentrations" conferred by in 1988. In corroboration of this claim, the petitioner submitted a copy of two pages of transcripts from dated July 22, 1998. Although these transcripts indicate the beneficiary received a bachelor's degree in either marketing or music from on May 23, 1998, the record is absent a copy of the actual degree that was conferred to the beneficiary by this institution on this date. It is noted that the record does contain a copy of a master of arts degree in that the beneficiary received from on April 30, 2005. Nevertheless, without a copy of the degree that was conferred to the beneficiary by on May 23, 1998, it cannot be concluded that the beneficiary possesses a bachelor's degree in "Business Administration with Marketing and Management Concentrations" as required by the ETA Form 9089. Consequently, the beneficiary cannot be considered to possess the education required by the ETA Form 9089.

At Part K. of the ETA Form 9089, which was signed by the beneficiary on July 7, 2009, the beneficiary listed employment as a mobilization and outreach specialist with the petitioner since March 1, 2008, employment as an outreach specialist with the petitioner from February 21, 2006 to February 29, 2008, employment as administrative coordinator with from June 5, 2005 to October 27, 2005, employment as a development intern with from August 1, 2004 to December 31, 2004, employment as a development consultant with the from September 3, 2002 to December 15, 2005, and employment as a music director with the from April 1, 1999 to August 31, 2002. The record contains Form W-2 statements issued by the petitioner to the beneficiary in 2006, 2007, and 2008, as well as separate statement from the petitioner's chief financial officer confirming the beneficiary's employment with the petitioner since 2006.

As noted above, the petitioner indicated that the offered position of mobilization and outreach specialist required 48 months of experience in the job offered at Part H. Question 6., of the ETA Form 9089. Therefore, the beneficiary must possess 48 months of experience in the offered position of mobilization and outreach specialist as of the priority date of November 29, 2008. Clearly, the beneficiary has nine months of experience in the job offered as a result of her employment as a

mobilization and outreach specialist with the petitioner from March 1, 2008 to November 29, 2008. This experience may not be considered since the petitioner indicated in Part J, Question 21, that the beneficiary did not gain qualifying experience with the petitioner. Also, the petitioner neither provided evidence nor offered an explanation as to how the beneficiary gained experience in the offered position of mobilization and outreach specialist when she had been employed in a different position as an outreach specialist with the petitioner from February 21, 2006 to February 29, 2008, and the ETA Form 9089 does not permit qualifying experience to be gained in alternate occupations. Thus, it cannot be concluded that the beneficiary possesses 48 months of experience in the job offered as required by ETA Form 9089.

Lastly, the record contains no evidence to establish the beneficiary is "Proficient in MAC and PC; advanced MS Word, PowerPoint, Excel, iMIS, ACT!, desk-top publishing and online project mgmt," as required at Part H. 14. of the ETA Form 9089. Therefore, it cannot be concluded that the beneficiary possesses the skills for the offered position of mobilization and outreach specialist.

The motion will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

Accordingly, the motion and the appeal will be dismissed.

ORDER: The motion is dismissed.